

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CYRIL SABBAGH, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff(s),

v.

CELL THERAPEUTICS, INC., DR. JAMES A
BIANCO M.D. and DR. JACK W. SINGER,
M.D.,

Defendant(s).

ORDER ON MOTIONS FOR
CONSOLIDATION AND
APPOINTMENT OF LEAD
PLAINTIFF AND APPROVAL OF
LEAD COUNSEL

NO. C10-414MJP

MICHAEL LAQUIDARI, Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

CELL THERAPEUTICS, INC., DR. JAMES A
BIANCO M.D. and DR. JACK W. SINGER,
M.D.,

Defendants.

NO. C10-480MJP

[Captions continued on next page]

WILLIAM SNYDER, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff(s),

v.

NO. C10-559MJP

CELL THERAPEUTICS, INC., JAMES A
BIANCO, PHILLIP M. NUDELMAN, LOUIS
A. BIANCO, JOHN H. BAUER, RICHARD L.
LOVE, MARY O. MUNDINGER, JACK W.
SINGER, FREDERICK W. TELLING and
RODMAN & RENSHAW LLC,

Defendant(s).

The above-entitled Court, having received and reviewed

[In Case No. C10-414]

1. Motion of Yangjin Kim for Consolidation of Related Actions, Appointment as Lead Plaintiff and Approval of Lead Counsel (Dkt. No. 17); Memorandum of Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead Plaintiff (Dkt. No. 41); and Moustafa F. Moukarim's Consolidated Opposition to All Other Motions for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel (Dkt. No. 42);
2. Motion of the CTIC Investor Group to Consolidate Related Actions; To Be Appointed Lead Plaintiff; and to Approve Proposed Lead Plaintiff's Choice of Counsel (Dkt. No. 19); Memorandum of Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead Plaintiff (Dkt. No. 41); and Moustafa F. Moukarim's Consolidated Opposition to All Other Motions for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel (Dkt. No. 42); Reply Memorandum of

1 Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead
2 Plaintiff (Dkt. No. 44);

- 3 3. Motion of the Shu Group for Consolidation of Related Actions, Appointment as Lead
4 Plaintiff and for Approval of Selection of Counsel (Dkt. No. 21); Memorandum of
5 Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead
6 Plaintiff (Dkt. No. 41); and Moustafa F. Moukarim's Consolidated Opposition to All
7 Other Motions for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's
8 Selection of Lead Counsel (Dkt. No. 42);

- 9 4. Moustafa F. Moukarim's Motion for Consolidation, Appointment as Lead Plaintiff
10 and Approval of His Selection of Lead and Liaison Counsel (Dkt. No. 25);
11 Memorandum of Law in Further Support of the CTIC Investor Group's Motion to Be
12 Appointed Lead Plaintiff (Dkt. No. 41); Moustafa F. Moukarim's Reply in Further
13 Support of His Motion for Consolidation, Appointment as Lead Plaintiff and Approval
14 of His Selection of Lead and Liaison Counsel (Dkt. No. 43);

15 **[In Case No. C10-480]**

- 16 5. Motion of the CTIC Investor Group to Consolidate Related Actions; To Be Appointed
17 Lead Plaintiff; and to Approve Proposed Lead Plaintiff's Choice of Counsel (Dkt. No.
18 10); Memorandum of Law in Further Support of the CTIC Investor Group's Motion to
19 Be Appointed Lead Plaintiff (Dkt. No. 18); Reply Memorandum of Law in Further
20 Support of the CTIC Investor Group's Motion to Be Appointed Lead Plaintiff (Dkt.
21 No. 19);

[In Case No. C10-559]

6. Motion of the CTIC Investor Group to Consolidate Related Actions; To Be Appointed Lead Plaintiff; and to Approve Proposed Lead Plaintiff's Choice of Counsel (Dkt. No. 20); Memorandum of Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead Plaintiff (Dkt. No. 35); Reply Memorandum of Law in Further Support of the CTIC Investor Group's Motion to Be Appointed Lead Plaintiff (Dkt. No. 36);

and all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that

1. The above-entitled matters are consolidated for all purposes, including pretrial proceedings and trial; every pleading in these consolidated actions shall bear the following caption:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re CELL THERAPEUTICS, INC.
CLASS ACTION LITIGATION

Master Docket No. C10-414MJP
(consolidated with Nos. C10-480MJP and C10-559MJP)

This Document Relates To:

2. When a pleading or other court paper filed in the consolidated action is intended to apply to all actions, the words "All Actions" shall appear immediately after the words "This Document Relates To:" in the above caption. When a pleading or other court paper is intended to be applicable only to one, to some, but not all of such actions, the party filing the document shall indicate the

1 action(s) to which the document is intended to be applicable by last name of the named plaintiff(s)
2 and the docket number(s).

3 3. The files of these consolidated actions shall be maintained in one file under Master
4 Docket No. C10-414MJP.

5 4. All counsel who have been granted *pro hac vice* admission in any one of these
6 consolidated actions shall be deemed to be admitted *pro hac vice*, without further filings, in Master
7 Docket C10-414MJP.

8 IT IS FURTHER ORDERED that the CTIC Investor Group is appointed as the Lead Plaintiff
9 in this action, and that Brower Piven and Zwerling, Schachter & Zwerling LLP are appointed to serve
10 as Lead Counsel and Liaison Counsel, respectively, in this matter.

11 **Background**

12 The above-entitled actions allege substantially identical claims of misrepresentation and loss
13 surrounding certain activities of Defendant Cell Therapeutics, Inc. ("CTI") and its representatives.
14 The Court does not find it necessary at this time to recount the allegations – it is enough for purposes
15 of this order to take notice that the claims are substantially similar and are being made by nearly
16 identical classes of CTI securities purchasers.

17 The first of these actions (the Sabbagh Action) was filed on March 12, 2010. Two additional
18 lawsuits (the Laquidari Action and the Snyder Action) were filed later; they are essentially identical,
19 except the Snyder Action added allegations on behalf of purchasers of CTI securities pursuant or
20 traceable to Defendant's public offering on or about July 23, 2009. In keeping with the requirements
21 of 15 U.S.C. §78u-4(a)(3)(A)(i) and 15 U.S.C. §77z-1(a)(3)(A)(i), publication of the first notice of a
22 class action against Defendants was made on Business Wire (a nationally-distributed business wire
23 service) and members of the proposed class were advised of their right to petition for appointment as
24 Lead Plaintiff no later than 60 days from the notice date. See Drachler Decl., Ex. D.

1 Motions for consolidation and appointment as Lead Plaintiff were timely filed by the
2 following:

- 3 1. Yangjin Kim
- 4 2. The CTIC Investor Group
- 5 3. The Shu Group
- 6 4. Moustafa F. Moukarim

7 Discussion

8 Consolidation

9 FRCP 42(a) permits consolidation when the actions present “a common question of law or
10 fact.” All the proposed Lead Plaintiffs in the above-entitled matters agree that all the cases present
11 nearly identical factual and legal issues, with similarly-situated shareholders alleging the same
12 violations of federal securities laws against the same defendants during substantially the same period
13 of time.

14 Under these circumstances, the Court finds consolidation of all cases warranted and will so
15 order. Under the Private Securities Litigation Reform Act (“PSLRA”), Securities Exchange Act § 21
16 (15 U.S.C. §78a *et seq.*), this order of consolidation is a prerequisite to the designation of Lead
17 Plaintiff and Lead Counsel.

18 If more than one action on behalf of a class asserting substantially the same claim
19 or claims arising under this title has been filed, and any party has sought to consolidate
20 those actions for pretrial purposes or for trial, the court shall not make the determination
[of appointment of Lead Plaintiff under § 21D(a)(3)B)(i)] until after the decision on
the motion to consolidate has been rendered.

21 15 U.S.C. § 78U-4(a)(3)(b)(ii). “As soon as practicable” after the consolidation decision has been
22 reached, the Court is encouraged to resolve the Lead Plaintiff issue. Id.

1 Lead Plaintiff

2 The PSLRA has formalized the procedure for selection of the Lead Plaintiff in a securities
 3 class action. See 15 U.S.C. §78u-4(a)(3), 15 U.S.C. §77z-1(a)(3). The first step requires the plaintiff
 4 filing the first action, within 20 days of filing that lawsuit, to publish a notice to the proposed class
 5 informing potential class members of their right to move for appointment as Lead Plaintiff. 15
 6 U.S.C. §78u-4(a)(3)(A)(i), 15 U.S.C. §77z-1(a)(3)(A)(i). That has been accomplished. See Drachler
 7 Decl., *supra*. The PSLRA further requires the Court to “appoint as lead plaintiff the member or
 8 members of the purported class that the court determines to be most capable of adequately
 9 representing the interests of the class members[.]” 15 U.S.C. § 78U-4(a)(3)(b)(i). The language of
 10 the statute implies that groups as well as individuals can act as Lead Plaintiff.

11 Currently before the Court are four motions – two by individuals (Yangjin Kim and Moustafa
 12 Moukarim) and two by investor groups (the Shu Group and the CTIC Investor Group) – requesting
 13 appointment as Lead Plaintiff. The PSLRA directs that the Court consider the following criteria in
 14 making the determination of who will most adequately represent the interests of the class members:

15 [T]he court shall adopt a presumption that the most adequate plaintiff in any private action
 16 arising under this title is the person or group of persons that –

17 (aa) has either filed the complaint or made a motion in response to a notice. . .

18 (bb) in the determination of the court, has the largest financial interest in the relief
 19 sought by the class; and

20 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 21 Procedure (pertaining to class actions].

22 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), 15 U.S.C. §77z-1(a)(3)(B)(iii)(I).

23 The Court is satisfied that all the Lead Plaintiff applicants satisfy the first criteria in that they
 24 timely filed a motion requesting appointment within the statutory period provided for in the PSLRA.
 25 Turning to the second criteria, the financial interests of the respective applicants (in terms of the
 26 claimed losses from the alleged violations of securities law of the defendants) are stated as:

Applicant	Claimed Loss
The Shu Group	\$53,557.52
Yangjin Kim	\$71,381.00
Moustafa Moukarim	\$91,797.52
The CTIC Investor Group	\$337,252.65

The Court notes that, following the filing of their initial motions for appointment as Lead Plaintiff, neither the Shu Group nor Mr. Kim filed any responsive pleadings to the motions of the other interested parties, nor further pleadings on their own behalf. Since it is clear that neither of these applicants possesses the largest financial interest in the relief sought by the class, the analysis from this point forward will be confined to the requests of Mr. Moukarim and the CTIC Investor Group.

Neither of the remaining parties challenged the other's assertion or calculation of loss, nor does either applicant assert that the other's claims are not typical of the class – the Court finds that the “typicality” aspect of the FRCP 23 requirements is met by both prospective applicants. Mr. Moukarim, however, launched a vigorous challenge to the appointment of the CTIC Investor Group, a challenge addressed to the group's “adequacy” to represent the interests of the class.

Despite the clear intent of the statutory scheme that a “group of persons” may be appointed to the Lead Plaintiff role, no other aspect of the appointment process has generated more controversy (and more inconsistent methodologies) than consideration of the adequacy of groups to serve as Lead Plaintiff. While the Ninth Circuit has left it to the district courts to decide whether a group of class members can aggregate their losses for purposes of qualifying as a lead plaintiff (In re Cavanaugh, 306 F.3d 726, 731 n. 8 (9th Cir. 2002)), the current state of the law reflects “widespread disagreement amongst district courts regarding this issue. . . [D]istrict courts across the country. . .

1 have made irreconcilable conclusions based on similar facts.” Eichenholtz v. Verifone Holdings,
2 Inc. (2008 WL 3925289 at *8 (N.D. Cal.)).

3 The danger which most courts addressing this issue have sought to avoid is the specter of
4 unrelated groups of investors, (1) assembled by lawyers for the purpose of aggregating their losses to
5 give them “the largest financial interest” among the lead plaintiff candidates and then (2) getting out
6 of the way so that the lawyers can direct the litigation in a manner presumably not in the best
7 interests of the class. The trend in recent years, however, seems to be away from a blanket
8 prohibition against “lead plaintiff groups” with no pre-existing relationship:

9 [Although] appointing a group of unrelated investors undercuts the primary purpose of the
10 PSLRA. . . a pre-existing relationship between entities that comprise a group is not required if
the resulting group is small and cohesive enough such that it can adequately control and
oversee the litigation.

11 Id. (citations omitted)

12 The concerns raised by Mr. Moukarim echo the reservations expressed by a variety of district
13 courts concerning the dangers of “lawyer-driven” lead plaintiff groups. This Court recognizes those
14 dangers, but does not find them at issue in the application of the CTIC Investor Group for Lead
15 Plaintiff position in this consolidated litigation.

16 Mr. Moukarim argues that “the CTIC Investor Group has failed to explain and justify its
17 composition. It has not explained how and when the group was formed or whether its members have
18 any pre-existing relationships.” Moukarim Consolidated Opp’n, p. 4. Mr. Moukarim is correct
19 about the lack of “history” or “pre-existing relationship” among the Investor Group — as one Ninth
20 Circuit district court noted:

21 [M]ost investors in a publicly traded company are strangers to each other, who invest their
22 money anonymously and autonomously. Limiting the potential pool of lead plaintiffs to those
23 with a pre-litigation relationship would foreclose the great majority of investors, who are
willing and able to come together, to pursue a securities class action. In re Versata, Inc.
24 Securities Litigation, 2001 WL 34012374 at *6 (N.D. Cal.).

1 But his conclusion – that, because of their lack of a pre-existing relationship, “this group is not the
2 type contemplated by the PSLRA” (Id.) – is not even supported by the cases which he cites in his
3 own behalf.

4 Schrivier v. Impac Mortgage Holdings, Inc., et al. (2006 U.S. Dist. LEXIS 40607, C.D. Cal.) –
5 cited by Mr. Moukarim for its language regarding an applicant group’s failure to explain “why its
6 members combined into [a] group[] in the first place” (Id. at *25) – aligns itself with the recent trend
7 in this area in finding that groups of unrelated investors (1) are “not per se impermissible lead
8 plaintiffs under the PSLRA,” but (2) will not be deemed adequate class representatives “absent a
9 showing that they are able to coordinate their efforts in the litigation.” Id.

10 Likewise, the efforts of the group in In re Microstrategy Inc. Securities Litigation (110
11 F.Supp.2d 427 (E.D. Va. 2000)) were faulted for the group’s “failure to present evidence with respect
12 to its formation, its operational structure, or whether the members of the group had ever
13 communicated with one another about their roles.” Id. at 437. This is not the case with the CTIC
14 Investor Group, who have presented detailed evidence covering all these topics. The Schrivier and
15 Microstrategy groups’ applications were further tainted by their request to retain multiple law firms
16 as lead counsel; again, a situation which the application of the CTIC Investor Group does not present.

17 Mr. Moukarim’s entire objection to the CTIC Investor Group’s application is built around a
18 series of cases which are unified by their common concern that the applicant groups have not
19 demonstrated their ability, willingness and mechanism for directing the litigation and acting as
20 zealous advocates for the class (as opposed to passive pawns of their attorneys). The concerns have
21 been expressed variously as failure “to provide meaningful information about [their] identity. . . [or]
22 volunteer anything more than conclusory assertions about its competence to manage this case”
23 (Switzenbaun v. Orbital Sciences Corp., 187 F.R.D. 246, 250 (1999)); “[o]rganizing disparate
24 combinations of shareholders for the purpose of aggregating the ‘most damage’” (Stengle v.

1 American Italian Pasta Co., 2005 U.S. Dist. LEXIS 43816 at *14); “[a]ggregating solely for the
2 purpose of creating a group that would have the ‘largest financial interest in the relief sought by the
3 class’” (Wenderhold v. Cylink Corp., 188 F.R.D. 577, 586 (N.D. Cal. 1999)); submitting nothing
4 more than a declaration of counsel (Ross v. Abercrombie & Fitch Co., 2007 U.S. Dist. LEXIS 24903
5 at *7 (S.D. Ohio)); inability of the group “to demonstrate how they intend to coordinate their efforts
6 in this litigation.” These are legitimate concerns which are not in evidence in this matter.

7 This Court has previously observed that “courts have long been wary of artificially-
8 constructed ‘plaintiff groups’ which assemble for no purpose other than qualifying as lead plaintiff”
9 (Schonfield v. Dendreon Corp., 2007 U.S. Dist. LEXIS 76816 at *6 -*7 (W.D. Wash. 2007)), and
10 thus has joined in interposing (for proposed groups with no pre-litigation connection) a requirement
11 for additional information:

12 Such information should include descriptions of its members, including any pre-existing
13 relationships among them; an explanation of how it was formed and how its members
14 would function collectively; and a description of the mechanism that its members
15 and the proposed lead counsel have established to communicate with one another about
16 the litigation. If the proposed group fails to explain and justify its composition and structure
17 to the court's satisfaction, its motion should be denied or modified as the court sees fit.

18 Dendreon at *6 (quoting In re Networks Assocs., Inc., Sec. Litig., 76 F.Supp.2d 1017, 1026 (N.D.
19 Cal. 1999)).

20 The Court finds that the members of the CTIC Investor Group have done exactly that. Each
21 of the three members of the proposed Lead Plaintiff group (Dr. Satish Shah, David Gipson and
22 Xavian L. Draper) have submitted sworn declarations detailing their investments in CTI’s securities
23 during the class period and demonstrating their willingness to represent the class. See Drachler
24 Decl., Ex. C. The declarations detail their backgrounds, investment experience, their willingness and
25 agreement to act as a cohesive group, their intention to regularly consult with each other regarding
26 the conduct of this lawsuit, their process for sharing information and decision-making, how decisions
will be made between them and how their counsel will be overseen. They have agreed upon a

1 spokesperson (Dr. Shah) who will, should an unanticipated emergency arise, be authorised to act for
2 the group. Id. The Court is satisfied that these parties have shown that they have the intention and
3 structure for prosecuting this action collectively and that they are willing to do what is necessary to
4 remain current on the status of the litigation, to remain in contact with each other and to supervise
5 their counsel. Their declarations address every concern raised by courts who have questioned the
6 ability of previously-unrelated group members to cohesively, proactively represent their class.

7 The Court's confidence in the selection of the CTIC Investor Group as Lead Plaintiff is
8 further bolstered by the fact that it does not appear that this group was assembled merely for the
9 purpose of aggregating their losses in order to surpass the financial interests of any of the other
10 applicants. In actuality, two of the members of the CTIC Investor Group (Dr. Shah and Mr. Gipson)
11 have *individual* losses (\$158,696.50 and \$133,187.31, respectively) which exceed the financial
12 interests of all other applicants, including Mr. Moukarim's losses of \$91,797.90. CTIC Reply Memo,
13 p. 5.

14 Finally, the Court observes that the size of the CTIC Investor Group is in keeping with the
15 Securities and Exchange Commission's own position on the appropriate size of such an aggregation:

16 . . . a court generally should approve a group small enough to be capable of effectively
17 managing the litigation and the lawyers. The Commission believes that ordinarily this should
18 be no more than three to five persons, a number that will facilitate joint decision-making and
also help to assure that each group members has a sufficiently large stake in the litigation.

19 In re Baan Co. Securities Litigation, 186 F.R.D. 214, 224 (D.D.C. 1999) (citing the Memorandum of
the Securities and Exchange Commission, Amicus Curiae, Introduction and Summary of the
Commission's Position, at 1).

20 To summarize, the Court finds that the CTIC Investor Group has timely filed its notice of
21 intent to serve as Lead Plaintiff, has the largest financial interest in the relief sought by the class, and
22 satisfies the requirements of FRCP 23 pertaining to class representatives. The group meets all
23 requirements for "presumptive Lead Plaintiff" status and their only serious challenger has not
24

1 rebutted that presumption. CTIC Investor Group will be appointed Lead Plaintiff for this
2 consolidated class action.

3 Lead counsel

4 Once the Court has designated a Lead Plaintiff, the plaintiff “shall, subject to the approval of
5 the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court
6 has reviewed the declarations and evidence submitted regarding Brower Piven, the CTIC Investor
7 Group’s choice as Lead Counsel, and finds that the firm has litigated numerous complex securities
8 cases, as well as a variety of other complex class actions. See Drachler Decl., Ex’s E and F. No
9 objections have been interposed concerning the law firm’s qualifications to serve in this capacity.
10 Accordingly, the Court will appoint Brower Piven as Lead Counsel in this consolidated matter.
11 Zwerling, Schachter & Zwerling will be appointed as Liaison Counsel in accord with Lead Plaintiff’s
12 request.

13 Consolidated Joint Status Report

14 By separate order, the Court will direct lead counsel for Plaintiffs and counsel for Defendants
15 to conduct initial discovery and prepare a joint status report in this newly-consolidated matter.

16
17 The clerk is ordered to provide copies of this order to all counsel.

18 Dated: __August 2__, 2010

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20 

21 Marsha J. Pechman
22 U.S. District Judge
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24
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